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Nos. 02-1472 & 03-853

IN THE

Supreme Court of the United States

CHEROKEE NATION OF OKLAHOMA and
SHOSHONE-PAIUTE TRIBES OF THE DUCK VALLEY RESERVATION,

Petitioners,

v.

TOMMY G. THOMPSON,
Secretary of Health and Human Services, *et al.*,

Respondents.

TOMMY G. THOMPSON,
Secretary of Health and Human Services,

Petitioner,

v.

CHEROKEE NATION OF OKLAHOMA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND FEDERAL CIRCUIT

BRIEF OF THE TUNICA-BILOXI TRIBE OF LOUISIANA, THE RAMAH NAVAJO SCHOOL BOARD, INC., THE RAMAH NAVAJO CHAPTER, AND THE OGLALA SIOUX TRIBE AS *AMICI CURIAE* IN SUPPORT OF THE CHEROKEE NATION AND THE SHOSHONE-PAIUTE TRIBES

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INTEREST OF *AMICI CURIAE*

Pursuant to United States Supreme Court Rule 37.3, the Tunica-Biloxi Tribe of Louisiana, the Ramah Navajo School Board, Inc., the Ramah Navajo Chapter, and the Oglala Sioux Tribe, with the written consent of all parties, submit this *amici curiae* brief supporting the Cherokee Nation and the Shoshone-Paiute Tribes.[1] The written consents are on file with the Clerk of the Court.

Amici are federally-recognized Indian tribes and tribal organizations owed contract support costs. The Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board, Inc., are named plaintiffs in a putative class action in the District Court for the District of Columbia, *Tunica-Biloxi Tribe of Louisiana v. United States*, No. 1:02CV02413 RBW (filed Dec. 9, 2002). That case presents contract support claims for Fiscal Years 1995, 1996, and 1997, years involving lump sum appropriations (lump sum years) identical to those presented here, and claims for underpayment of contract support costs in the later years in which the annual appropriations acts limited how much of those appropriations could be used by the Secretary to pay the government's contract support costs obligations (cap years).

The Ramah Navajo Chapter and the Oglala Sioux Tribe are named plaintiffs in a certified class action seeking contract support on self-determination contracts awarded by the Bureau of Indian Affairs, an agency of the Department of the Interior, in *Ramah Navajo Chapter v. Norton*, D.N.M.

1. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party authored this brief, in whole or in part; and that no person or entity, other than Amici and their counsel, contributed monetarily to the preparation and submission of this brief.

No. CIV 90-0957 LH, on remand from *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). The lump sum year claims in that case were settled. *Ramah Navajo Chapter v. Babbitt*, 50 F. Supp. 2d 1091 (D.N.M. 1999), and *Ramah Navajo Chapter v. Norton*, 250 F. Supp. 2d 1303 (D.N.M. 2002). Cap year claims in that case are pending.

SUMMARY OF ARGUMENT

A decision for the Cherokee Nation and the Shoshone-Paiute Tribes (collectively, "Cherokee") may rest solely upon the availability of funds. That is but the narrowest ground for a ruling in favor of Cherokee. This brief presents a different basis for that outcome.

In 1988, Congress amended the Indian Self-Determination Act, 25 U.S.C. §§ 450, *et seq.*, to create an enforceable federal contractual obligation to pay contract support in the amount necessary to operate the contracted program. 25 U.S.C. § 450j-1(g). That provision in combination with section 450j-1(a)(2) directs the Secretary of Health and Human Services ("the Secretary"), without regard to availability of appropriations, to add the full requisite amount of contract support to each Indian Self-Determination Act contract on an annual basis. This directive confers contract authority upon the Secretary, the power delegated by Congress to an agency to bind the United States to an obligation even in the absence of an appropriation to liquidate it. Cherokee should therefore prevail on its contract claim against the United States regardless whether sufficient funds were available from appropriations to permit the Secretary to discharge the United States' contractual obligations.

Only when Congress funds a program does the contract support add-on obligation arise. Since contract support rises and falls in proportion to the level of the program appropriated by Congress, Congress retains the power of the purse by controlling program levels. 25 U.S.C. § 450j-1(a)(2).[2] If Congress chooses not to fund Indian health programs, no claim for contract support arises. But once Congress enacts an appropriation for health programs, contract support necessary to operate the contracted program at the Secretarial level is a mandatory component of the contract price. Contract authority as to contract support costs is the means employed by Congress to ensure adequate and stable funding to carry out self-determination contracts at the Secretarial level.

By making self-determination contracts enforceable under the Contract Disputes Act, 41 U.S.C. §§ 601, *et seq.*, Congress has made clear that they are no less enforceable than other federal contracts. Case law on the enforcement of federal contracts recognizes that Congress may authorize contractual obligations in advance of appropriations. In some other statutes and contracts, Congress forbids creation of enforceable contract obligations beyond appropriations sufficient to liquidate the obligation. But the exculpatory clauses applicable to self-determination contracts differ radically in wording from those in such statutes and contracts. The clauses here restrict only expenditure authority, the

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2. Most contract support costs are indirect costs set by rates negotiated with the cognizant agency, usually the Interior Department. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1457 (10th Cir. 1997). Nationwide, rates have remained uniform at approximately 25%. U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 30 (No. GAO/RCED-99-150, June 1999).

authority of the Secretary to liquidate an obligation. They do not limit the Secretary's contract authority, the authority to create the federal contract obligation in the first instance. Moreover, government-drafted exculpatory clauses are subject to especially close scrutiny when the Executive Branch has created or contributed to an insufficiency of funds by failing to ask Congress for adequate appropriations. *S.A. Healy Co. v. United States*, 576 F.2d 299 (1978); *San Carlos Irrigation & Drainage District v. United States*, 23 Cl. Ct. 276 (1991).

Contrary to the suggestion on page 27 of the Government's Petition for Certiorari in No. 03-853, liability in cap years remains at issue in three pending cases: *Ramah Navajo Chapter v. Norton*, No. CIV 90-0957 LH (D.N.M.), on remand from *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Tunica-Biloxi Tribe of Louisiana v. United States*, No. 1:02CV02413 RBW (D.D.C., filed Dec. 9, 2002); and *Pueblo of Zuni v. United States*, No. CIV 01-1046 LH/LEG (D.N.M., filed Sept. 10, 2001.)[3] The instant

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3. The issue of cap year liability was decided in the Government's favor in *Babbitt v. Oglala Sioux Tribal Safety Dep't*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000). That case held that the proviso at 25 U.S.C. § 450j-1(b) prevents recovery for a cap year shortfall. However, the *Oglala* analysis did not consider the contract authority argument and did not take into account the Contract Disputes Act provision, 41 U.S.C. § 612(a), for payment of contract judgments against the United States from the Permanent and Indefinite Judgment Fund. It also failed to distinguish the "provision of funds" formulation in section 450j-1(b) from the standard formulation used when Congress intends to restrict contract authority as opposed to expenditure authority. *See* No. 02-1472, Petition for Certiorari 78a. The court thus did not apply ordinary contract law principles.

(Cont'd)

appeals concern lump sum years in which no appropriation act restrictions were imposed on the Secretary's use of appropriations for payment of contract support. If the Court rules that funds sufficient to pay the contract support amounts here sought by the tribes were available, the additional argument presented here need not be addressed.

ARGUMENT

I. *Self-Determination Contracts Are No Less Enforceable Than Other Federal Contracts.*

By incorporating the Contract Disputes Act, 41 U.S.C. §§ 601, *et seq.*, into the Indian Self-Determination Act, 25 U.S.C. § 450m-1(d), Congress provided that self-determination contracts would be no less enforceable than other federal contracts:

> . . . . [T]he Committee determined that the use of the term "contract" is important to convey the sense of a legally binding instrument that cannot be terminated by administrative action without the

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(Cont'd)

Neither did the Tenth and Ninth Circuit panels that followed *Babbitt* apply ordinary principles of federal contract law in their analysis of the Indian Self-Determination Act. *Cherokee Nation v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), now before this Court in No. 02-1472, clashes with the Tenth Circuit's prior ruling in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (1997), *discussed infra*, at 7-8. Both *Cherokee* and *Shoshone-Bannock Tribes v. Thompson*, 279 F.3d 660 (9th Cir. 2002), misconstrued a "shall remain available" appropriation clause for new and expanded contracts as a cap on existing contracts and applied the flawed reasoning of *Oglala* to the newly found cap.

> legal consequences that would be associated with the termination of contractual obligations by either party. Furthermore, the Committee believes that the retention of the term "contract" is consistent with the provision which authorizes the application of the Contract Disputes Act to self-determination contracts.

Sen. Rep. No. 100-274, at 19 (1987).

This consequence of Public Law 100-472 was known well before passage. On March 11, 1988, the Department of Justice commented on S. 1703:

> . . . To the extent there is a recognizable body of public contract law, it largely has evolved as the courts or agency boards of contract appeals have interpreted and applied federal procurement law and the federal acquisition regulations. [fn 12] Regardless that self-determination contracts may not otherwise be considered "procurement contracts," unless this body of existing law can be looked to for guidance, the courts and boards will have no foundation upon which to resolve disputes.
>
> > [fn 12] The Contract Disputes Act, by its terms and from the legislative history, was carefully crafted to apply principally to "procurement contracts." *See* 41 U.S.C. 602(a) (1982). . . . As a result, the substantive law involving the Contract Disputes Act essentially is procurement contract law.

Letter from John R. Bolton to Daniel K. Inouye 7-8 (March 11, 1988) (reproduced in Appendix to this Brief at 12a).

The Department of Justice foresaw that the Contract Disputes Act would bring contract authority to bear:

> Applying the Contract Disputes Act to self-determination contracts raises many serious concerns [fn 13]. . . .
>
> > [fn 13] For example, because funding for self-determination contracts is appropriated and managed in markedly different fashion from other agency appropriations, with the agency having much less flexibility to shift self-determination funds, applying the Contract Disputes Act – and its provisions concerning access to and reimbursement of the Judgment Fund for successful claims – to self-determination contracts may well lead to a significant loss of agency and Congressional control over appropriations for the self-determination program.

Id. at 13a.

Mindful of the Assistant Attorney General's analysis, Congress nonetheless proceeded to incorporate the Contract Disputes Act into the Indian Self-Determination Act. Pub. L. 100-472, § 206(a) (d), 102 Stat. 2285, 2294-95 (1988), codified as amended, 25 U.S.C. § 450m-1(a), (d).

The Tenth Circuit concluded that "the 1988 amendments to the Act mandate that tribes entering self-determination contracts receive full funding for all reasonable contract support costs associated with self-determination contracts." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1463 (1997).

Although the decision does not deal with insufficiency of appropriations, its analysis supports the existence of authority in the Secretary to create binding federal obligations for payment of contract support costs to self-determination contractors even if the Secretary is ultimately not given sufficient appropriations to liquidate those obligations.

II. *Contract Authority is Distinct from Expenditure Authority.*

It is well settled through a long series of federal contract cases as well as in the Budget Act[4] that the United States may be liable upon an obligation regardless whether a liquidating appropriation is made. 1 General Accounting Office, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-4 ("GAO Treatise"). *See also* Office of Management and Budget, BUDGET OF THE U.S. GOVERNMENT, FY 2005: THE BUDGET SYSTEM AND CONCEPTS 383 (2004).

Recognition of Congress' ability to authorize the creation of contract obligations even in the absence of appropriations to pay them goes back at least to *Major Collins' Case*, 15 Ct. Cl. 22, 35 (1879):

> This court, established for the sole purpose of investigating claims against the government, does not deal with questions of appropriations, but with the legal liabilities incurred by the United States. . . . That such liabilities may be created where there is no appropriation of money to meet them is recognized. . . .

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4. "The term 'budget authority' means the authority provided by Federal law to incur financial obligations, as follows: . . . (iii) contract authority, which means the making of funds available for obligation, but not for expenditure. . . ." 2 U.S.C. § 622(2)(A).

> The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made. . . . The liability, however, exists independently of the appropriation, and may be enforced by proceedings in this court.

To the same effect are *United States v. Langston*, 118 U.S. 389, 394 (1896) (simply because an appropriation is not sufficient to pay an obligation of the United States does not mean the obligation is abolished); *Bath Iron Works v. United States*, 20 F.3d 1567, 1583 (Fed. Cir. 1994) (judgments under the Contract Disputes Act are to be paid from the Judgment Fund, 31 U.S.C. § 1304, as directed by 41 U.S.C. § 612(a), regardless "whether adequate funds existed at the agency level to satisfy the judgment"); *New York Airways, Inc. v. United States*, 369 F.2d 743, 748-51 (Ct. Cl. 1966) (appropriation insufficiency does not bar recovery under an implied-in-fact contract authorized by law even where the statute contains a payment proviso tied to availability of appropriations); *Gibney v. United States*, 114 Ct. Cl. 38, 53 (1949) ("We know of no case in which any of the courts have held that a simple limitation on an appropriation bill of the use of the funds has been held to suspend a statutory obligation"); and *Wetsel-Oviatt Lumber Co. v. United States*, 38 Fed. Cl. 563, 571 (1997):

> Insufficient appropriations at the agency level "merely impose [ ] limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its sufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties." *Ferris [v. United States]*, 27 Ct. Cl. [542 (1892)], at 546; *see also New York*

> *Airways, Inc.*, 177 Ct. Cl. at 811, 369 F.2d 743 **("The failure to appropriate funds to meet statutory obligations prevents the accounting officers of the Government from making disbursements, but such rights are enforceable in the Court of Claims").**

(Emphasis and brackets added). *See also United States v. Vulte*, 233 U.S. 509, 514-15 (1914); *Dougherty's Case*, 18 Ct. Cl. 496 (1883).

While the Secretary does not have contract authority to award Secretarial program monies until Congress appropriates, 25 U.S.C. § 450j(c)(1), the Secretary has contract authority to create enforceable federal contract obligations for the payment of full contract support costs under the Indian Self-Determination Act whenever Congress does appropriate program monies because:

- the claims are made for years for which contractable program monies have been appropriated;

- the language of sections 450j-1(a)(2) to (5) and 450j-1(g) contains no condition that limits the peremptory command "shall add", by which the Secretary is authorized and directed to add to contracts executed under the statute the "full amount" of contract support costs required to administer those contracts;

- any other construction produces conflict among sections 450j-1(a), 450j-1(g), 450j(c)(1), and 450j-1(b); and

- section 450j-1(b)'s proviso is given its plain meaning, confining only the Secretary's expenditure authority.

Creating an entitlement to full contract support was the announced legislative purpose of the 1988 and 1994 amendments to the Indian Self-Determination Act.[5] Congress

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5. The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. Self-determination contractors' rights under the Act have been systematically violated particularly in the area of funding indirect costs. Existing law affords such contractors no effective remedy for redressing such violations.

Sen. Rep. No. 100-274, at 37 (1987).

> Throughout this section the Committee's objective has been to assure that there is no diminution in program level when programs, services, functions or activities are transferred to tribal operation. In the absence of section 106(a)(2), as amended [now 25 U.S.C. § 450j-1(a)(2)], a tribe would be compelled to divert program funds to prudently manage the contract, a result Congress has consistently sought to avoid.

Sen. Rep. No. 103-374, at 9 (1994). *And see Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997): "Defendants' interpretation of the Act is unreasonable. Not only does its interpretation not benefit tribes that have chosen to enter into self-determination contracts, it harms them by depriving them of funds necessary to carry out those contracts."

has legislative discretion to budget any amount it wants for Indian health care. But under its amended Indian Self-Determination Act scheme, once an appropriation has been made for programs or functions covered by a contract, the contractor is "entitled" (25 U.S.C. § 450j-1(g)) to have added to its Indian Self-Determination Act contract the full amount of contract support needed to run the contracted program. Congress may provide for a "Cadillac" program or a "Yugo" program but the mandate of section 450j-1(g) is that it arrive with a full fuel tank.[6]

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6. The relevant statutory provisions are:

> "There **shall be added** to the amount required by paragraph (1) contract support costs . . . to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-1(a)(2) (emphasis added);
>
> "Upon the approval of a self-determination contract, the Secretary **shall add** to the contract **the full amount of funds to which the contractor is entitled under subsection (a)** of this section." *Id.* § 450j-1(g) (emphasis added).
>
> "The amount of funds required by subsection (a) of this section – **(1) shall not be reduced** to make funding available for [among other things] contract monitoring or administration by the Secretary . . . [or] (3) . . . to pay for Federal functions. . . ." *Id.* § 450j-1(b)(3) (emphasis added).

Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996), is not to the contrary. That case, brought under the Administrative Procedure Act, 5 U.S.C. §§ 553, *et seq*., determined that the Secretary of the Interior's decision to apply a severe funding sanction for failure by plaintiff-contractors to submit an indirect cost proposal by a certain date was reviewable. The dispute concerned only

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The Department of Health and Human Services has already implicitly acknowledged the existence of contract authority for advance funding of Indian Self-Determination Act contracts. In a decision final for the agency, the Department's Appeals Board held that an Indian Self-Determination Act contractor must be paid at the outset of the contractor's fiscal year, even though funds for the last quarter of that year – which fell in the next federal fiscal year – had not yet been and might never be appropriated. *Matter of St. Regis Mohawk Tribe*, Departmental Appeals Board, No. 1808 (App. Div., Jan. 17, 2002), http://www.hhs.gov/dab/decissions/dab1808.html (as visited June 15, 2004).

III. *A Funds Available Clause Is Strictly Construed Against the Government.*

Government attorneys, to counter judicial rejection of their argument that an insufficient appropriation cancels a contract obligation, began inserting exculpatory "funds available" clauses into standard government contracts to shift the risk of insufficient appropriations to contractors. *See Matter of Army Corps of Engineers' Continuing Contracts*, 56 Comp. Gen. 437, 1977 WL 10467, containing a comprehensive history and discussion of funds available clauses; 2 GAO Treatise, at 6-51 (discussing *Army Corps*). The typical funds available clause runs paragraphs, even pages, using specific well-tested wording to provide variously that:

- the Government's *contract obligation* is contingent upon appropriations;

(Cont'd)

allocation of funds already under the Secretary's control. That strictly statutory action did not present any issue of *contract* interpretation. It did not seek a money judgment under the Contract Disputes Act; and it clearly distinguished the payment duties of the Secretary from the Government's contract obligation. 87 F.3d at 1344-45.

- the *contract is reduced* proportionate to any insufficiency of appropriations;

- the *contract amount* is reduced proportionate to any reduction in appropriation; and

- the *contractor assumes all risk* of loss if Congress fails to make a liquidating appropriation.

See, e.g., C.H. Leavell v. United States, 530 F.2d 878, 894-95 (Ct. Cl. 1976) (setting forth the standard "SP-19" funds available clause).

Congress has also imposed such limitations on the Government's liability in numerous statutes. A sample of over fifty such statutes is set forth in Cherokee's Petition for Certiorari, at 78a. Each employs precise language limiting the authority of an agency to bind the Government to a contract for more than the amount of appropriations available for the purpose. Of particular interest is section 1658 ("limitation on contract authority") of title 25, U.S.C., applicable to tribally controlled school grants added by Title V, § 501 of Pub. L. 100-713, 102 Stat. 4824:

> The authority of the Secretary to enter into contracts under this title [Title V, § 508 of Pub. L. 94-437] shall be to the extent, and in an amount, provided for in Appropriation Acts.

(Bracketed insert added).

That Act was passed by the same Congress and vetted by the same committees that reviewed and enacted the 1988 amendments including the proviso in Section 450j-1(b) to

the Indian Self-Determination Act, Public Law 100-472. *See also* 25 U.S.C. § 2008(g)(2), directing the Secretary to reduce school grants by the amount of any shortfall in appropriations. No comparable language appears in the Indian Self-Determination Act or in the Indian Self-Determination Act model agreement except as to the out-years of multi-year contracts. 25 U.S.C. § 450j(c)(1).[7]

The funds available clause in the model agreement does *not* make the United States' liability contingent on appropriations, does *not* state that a shortfall reduces the contract amount, and does *not* state the contractor assumes all risk of this shortfall. It says only:

> **Subject to the availability of appropriations, the Secretary shall make available** to the contractor the total amount specified in the annual funding agreement incorporated by reference in subsection (f)(2). . . .

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7. The Government mistakenly construes 25 U.S.C. § 450j(c)(1) to apply to current year contracts. Section 450j(c)(1) addresses multi-year Indian Self-Determination Act contracts. It limits only the Secretary's authority to bind the Government to precise dollar amounts for a given year before appropriations for Indian Health Service programs have been made for that year. The force of section 450j(c)(1) is expended once such an appropriation is made. *See* H. Rep. No. 93-1600, at 22, 29 (1974) (statement by Commissioner of Indian Affairs on behalf of Secretary of the Interior): "This discretionary authority provides for contracts over a year in length but, as to years after the first year, the contract is more of a declaration of intent until sufficient appropriated funds have become available for the future years." The proviso in section 450j-1(b) would not be needed if section 450j(c)(1) already applied. That the two provisions are fundamentally different in text works against the Government's contention and supports the tribal reading of the law. *Russello v. United States*, 464 U.S. 16, 23 (1983) (use of different words in same statute bespeaks different meaning and intent).

25 U.S.C. § 450*l*(c), *Model Agreement*, sec. 1(b)(4) (emphasis added). Had Congress wanted to limit the obligation of the United States to pay full contract support, rather than just the liquidation of that obligation by the Secretary, it demonstrably knew how to do so. All it had to do was employ the language of sections 1658, or 2008(g)(2), or any of the other statutes cited in Cherokee's Petition for Certiorari, at 78a.

In *New Valley Corp. v. United States*, 119 F.3d 1576 (Fed. Cir. 1997), the Government, after canceling space shuttle launches following the Challenger disaster, invoked an exculpatory clause to absolve itself of liability for not launching a contractor's satellite. The Federal Circuit held that, although the Government's reading was linguistically plausible, that reading would undo the parties' purpose in entering the agreement, destroy its validity, and give one party unlimited power over the other:

> Construing Art. V to permit the government, at its whim, to walk away from the [agreement] with impunity would render this article meaningless. . . . A party may not reserve to itself a method of unlimited exculpation without rendering its promises illusory and the contract void.

Id. at 1584, quoting *Torncello v. United States*, 231 Ct. Cl. 20, 681 F.2d 756, 760 (1982) (citation, internal quotation marks, and parentheses omitted). The court held instead that the exculpatory clause must be construed "narrowly and strictly" against the Government. 119 F.3d at 1584. The Indian Self-Determination Act contains a contract clause expressly requiring a rule of construction favoring the

contracting tribe, 25 U.S.C. § 450*l*(c), *Model Agreement*, sec. 1(a)(2).[8]

As in *New Valley*, the Government here reads its own exculpatory clause expansively to vitiate the entire purpose of the contract support provisions of the contract. That reading defeats the express intent of Congress in the 1988 and 1994 amendments to preserve program levels by providing full contract support costs to each contractor. The Government's construction thus contravenes the Court's directive that an Act of Congress "cannot be held to destroy itself". *AT&T v. Central Office Telephone., Inc.*, 524 U.S. 214, 227-28 (1998) (quoting *Texas & Pac. Ry v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907)). *See also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997).

Congress has never amended its original statutory directive making contract support a mandatory add-on proportional to the Secretarial program amount. Section 314 of the 1999 appropriations act, Pub. L. 105-277, 112 Stat. 2681, 2681-288 (1998), and the similar sections in later appropriations legislation simply limit the Secretary's *expenditure* authority for contract support. By contrast, *see Republic Airlines, Inc. v. U.S. Department of Transportation*, 849 F.2d 1315, 1322 (10th Cir. 1988), where the appropriations act clearly and specifically amended the governing statute.

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8. Further, federal statutes enacted for the benefit of Indians (such as the Indian Self-Determination Act) are to be construed liberally in favor of Native Americans, with ambiguous provisions construed in their favor. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-48 (1985).

Moreover, the Government has express trust and good faith duties with respect to Indian health care. 25 U.S.C. § 450*l*(c), Model Agreement, sec. 1(d)(1) and (2). The latter paragraph provides:

> To the extent that health programs are included in this Contract, and within available funds, the Secretary shall act in good faith in cooperation with the Contractor to achieve the goals set forth in the Indian Health Care Improvement Act (25 U.S.C. 1601 *et seq.*).

At the very least, these obligations encompass the duty to request sufficient appropriations, requests the Government has not made.[9] Courts construe funds available clauses strictly against the drafter, especially when the Government is at least partially responsible for an insufficiency in appropriations. In *S.A. Healy Co. v. United States*, 576 F.2d 299 (1978), the Court of Claims considered a broad funds available clause. The clause expressly limited the Government's liability when funds were not available. But, because it did not clearly shift the risk that the agency would fail to request sufficient appropriations, the court held the clause ambiguous and construed it in favor of the contractor:

9. The 1988 amendments to the act require the agencies to provide contract support costs to tribes for their reasonable costs associated with administering the BIA's and IHS' programs. However, since at least 1993, neither BIA nor IHS has requested full funding for these costs, nor has the Congress appropriated full funding for them. . . .

U.S. General Accounting Office, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED 34-35 (No. GAO/RCED-99-150, June 1999).

> Whether or not the funds available clause clearly allocates all risk of loss to the contractor when Congress cuts budget requests, we hold that the clause as a whole is not sufficient to shift the burden to the contractor when the administrative agency is at least partly to blame for the funds shortage.

Id. at 305.

> In short, then, we hold that the protective umbrella of the funds available clause, as worded in this contract, does not extend to an exhaustion of funds occasioned by the agency's decision to request funding grossly inadequate to support the level of earnings approved by the agency for the fiscal year. . . . We hold only that . . . a contract will not be construed to throw all the cost and loss necessarily incident to such a decision on the contractor, and none of it on the party whose decision caused the loss, unless clauses of the contract require that result without ambiguity. . . .

Id. at 307.

Citing *S.A. Healy Co.*, the court in *San Carlos Irrigation & Drainage District v. United States*, 23 Cl. Ct. 276 (1991), held that a non-Indian Bureau of Indian Affairs contractor could collect when the Government failed to perform its contractual obligation to maintain irrigation works. Among the defenses the Government asserted was this funds available clause:

> Where the operations of this contract extend beyond the current fiscal year, the contract is made

> contingent upon Congress making the necessary appropriations for expenditures hereunder after such current year shall have expired. In case such appropriation as may be necessary to carry out this contract is not made, the District hereby releases the United States from all liability due to the failure of Congress to make such appropriations.

Id. at 283-83. In rejecting this and other defenses, the court stated: "The United States cannot escape liability under the contract because the BIA did not attempt to obtain appropriations from Congress to repair the spillway gates." *Id.* at 283.

CONCLUSION

Expenditures for the fulfillment of contract obligations – debts of the United States – have priority over discretionary expenditures. The proviso at 25 U.S.C. § 450j(1)(b), providing that in the event of an insufficiency of appropriations the Secretary is not required to make expenditures for the fulfillment of contract obligations where to do so would necessitate reductions in services to non-contracting tribes, speaks to the Secretary's expenditure authority. It is an implicit recognition of contract authority.

The Government's reading contravenes the longstanding rule that a government contract is an assurance that the sovereign right to withhold payment will not be exercised because the government's "promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *Murray v. Charleston*, 96 U.S. 432, 445 (1878) (quoted by Mr. Justice Breyer, concurring in *United States v. Winstar*, 518 U.S. 839, 913 (1996)).

A decision in favor of the Government in the two cases under review in this Court would negate the 1988 and 1994 amendments and thus thwart the express intent of Congress to fix the contract support problem once and for all. It would return to treating self-determination contracts as social welfare grants as the court did in *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596, 600 (1985), cited with opprobrium in Senate Report No. 100-274, at 34 (1987). Public Laws 100-472 and 103-413 made clear that they indeed are contracts like any other. This Court should carry out the will of Congress by enforcing self-determination contracts just as federal contracts with non-Indians are enforced.

For these reasons, the decision of the Federal Circuit in *Thompson v. Cherokee Nation* should be affirmed and the decision of the Tenth Circuit in *Cherokee Nation v. Thompson* should be reversed.

Respectfully submitted,

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APPENDIX — LETTER FROM JOHN R. BOLTON TO DANIEL K. INOUYE DATED MARCH 11, 1988

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General
Washington, D.C. 20530

March 11, 1988

Honorable Daniel K. Inouye
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

In a letter dated October 27, 1987, I informed the Select Committee on Indian Affairs of the Department's objections to S. 1703, the "Indian Self-Determination and Education Assistance Act Amendments of 1987." My recent letter of January 26, 1988 expanded upon those objections insofar as they concerned application of the Indian Civil Rights Act to self-determination programs. Further comment upon section 201(c) of the Committee amendment to S. 1703 is also warranted, particularly in light of an amendment to section 103(c) of the Indian Self-Determination and Education Assistance Act enacted as part of the Continuing Resolution for fiscal year 1988. In fact, the need for section 201(c) of the Committee amendment to S. 1703 largely appears to have been obviated.

Appendix

As it now reads, amended section 103(c) of the Indian Self-Determination and Education Assistance Act ("the Act") provides as follows:

> The Secretary of Health and Human Services is authorized to require any tribe requesting that he enter into a contract pursuant to the provisions of this subchapter to obtain adequate liability insurance: *Provided, however.* That each such policy of insurance shall contain a provision that the insurance carrier shall waive any right it may have to raise as a defense the tribe's sovereign immunity from suit, but that such waiver shall extend only to claims the amount and nature of which are within the coverage and limits of the policy and shall not authorize or empower such insurance carrier to waive or otherwise limit the tribe's sovereign immunity outside or beyond the coverage and limits of the policy of insurance. For purposes of section 224 of the Public Health Service Act of July 1, 1944 (42 U.S.C. 233(a)), as amended by section 4 of the Act of December 31, 1970 (84 Stat. 1870), with respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigations, a tribal organization or Indian contractor carrying out a cc ntract, grant agreement, or cooperative agreement under sections 103 or 104(b) of this Act is deemed to be part of the public Health Service in the Department of Health and Human services while

> carrying out any such contract or agreement and its employees (including those acting on behalf of the organization or contractor as provided in section 2671 of title 28) are deemed employees of the service while acting within the scope of their employment in carrying out the contract or agreement.[1]

This new language will allow persons injured by certain acts of medical negligence to pursue a damage remedy against the United States under the Federal Tort Claims Act ("FTCA") in place of any remedy they may otherwise have had against a physician or health care provider. As you know, such a result had been a fundamental basis for our original opposition to S. 1703.[2]

In light of the above changes to section 103(c) of the Act, section 201(c) of the Committee amendment doubtless will be eliminated or amended further. We wish to express a concern which we hope will be taken into account in that process.[3]

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1. The highlighted language was added by the Continuing Resolution.

2. Section 201(a) of an unamended S. 1703 essentially would have accomplished the identical result by adding similar language to a renumbered section 102(c) of the Act.

3. We continue to be opposed to the notion that the Indian tribes should be singled out for special treatment by absolving them from responsibility for their negligence in administering self-determination

(Cont'd)

Appendix

As the Committee has recognized, whatever the merits of providing FTCA protection to Indian tribes and their employees, that protection should *not* extend to private physicians or health care providers who may be providing contract health care under a self-determination contract to a tribal organization -- so-called "indirect health care providers." *See* S. Rep. No. 274, 100th Cong., lst Sess. 27 (Dec. 22, 1987). It follows that the term "Indian contractor," as now contained in section 103(c) of the Act, should not be construed to include such private physicians and health care providers. And, in a letter to you dated November 18, 1987, Mr. Lloyd B. Miller, writing on behalf of "many Indian tribes and tribal organizations," specifically disavowed any intent or desire to bring these subcontractors within the FTCA.[4]

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health care contracts. Recognizing, however, that amendments to section 103 of the Act are a fait accompli, we offer the following as a suggestion to ensure that this new language is applied in a manner consistent with our previously expressed concern that third-party health care providers who contract with the Indian tribes not be included within the scope of persons now protected by the FTCA under section 103 (c) of the Act.

4. It should be noted that, for sound reasons rooted in public policy, the FTCA expressly does *not* apply to contractors of the United States. 28 U.S.C. 2671 ("Federal agency . . . does not include any contractor of the United States.") Thus, the inclusion of indirect health care providers within the term "Indian contractor" would not only be inconsistent with Congress's clearly expressed intent that the FTCA not cover independent government contractors, but would also unjustifiably give favored treatment to some such contractors but not others.

Nor would such a course of action be advisable from the standpoint of seeking to deter medical malpractice.[5]

Although we seem to be in agreement on this basic point, our common understanding of the properly limited scope of "Indian contractor" is not self-evident from the Act, as amended by the Continuing Resolution. To our knowledge, the term "Indian contractor" is nowhere defined in the Act. Unfortunately, it is our experience that in cases where the deep pocket of the federal government is involved, any ambiguity in the law all too often is exploited in litigation to the detriment of the United States.

Accordingly, we strongly recommend that section 201(c) of the Committee amendment to S. 1703 be replaced with language which would simply delete the reference to "Indian contractors" in section 103(c) of the Indian Self-Determination and Education Assistance Act added by the Continuing Resolution. This clarification should allow section 103(c) to be applied with a minimum of interpretive problems.

If, instead, the Committee intends to ignore the recent amendment to section 103(c) in favor of the more sweeping

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5. Our concern that the United States not accept responsibility for professional negligence unless it is accompanied by an adequate opportunity to control and supervise professional conduct is doubly important in this context. However limited may be the federal government's ability to control and supervise the tribes themselves, it far exceeds in scope any influence the federal government may exert over the medical, practice of persons who independently contract with the tribes.

changes presently contained in section 201 of the Committee amendment, a different aspect of providing FTCA protection to tribal contractors is implicated.[6] Although the report language discussing section 201 is confined to the area of medical malpractice, section 201 of the Committee amendment would extend the FTCA's coverage to *all* tribal negligence associated with carrying out virtually *any* self-determination contract, grant agreement, or cooperative agreement -- not just those associated with the provision of health care.

Whatever the particular merits of accepting federal responsibility for tribal medical malpractice, no need has been demonstrated for extending that indemnification to tribal conduct associated with the various other activities performed or capable of being performed by way of self-determination contracts or agreements. As presently structured in section 201, the United States will end up accepting financial responsibility for any number of everyday accidents that it had no hand in causing and that have no connection whatsoever to its obligations to the Indian tribes.[7] It is

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6. Section 201 of the Committee amendment does not contain the ambiguous reference to "Indian contractors," and the report accompanying S. 1703 makes it clear that private physicians and health care providers are not to be extended the protection of the FTCA.

7. The largest source of non-medical malpractice liability exposure will be automobile accidents, slip and fall cases, and similar "garden variety" type torts. We simply do not understand why the United states should accept financial responsibility for automobile accidents and similar everyday torts involving tribal employees.

imperative, in this regard that, as it is now, section 103(c) of the Act (becoming section 102(c) if S. 1703 is enacted) clearly be limited to medical malpractice claims.

Aside from the above suggestions, and those expressed earlier, we continue to have fundamental concerns with other provisions of the Committee amendment to S. 1703. Among other concerns, we object to proposed section 110 of the Act as contained in section 206 of the Committee amendment to S. 1703.

Proposed section 110(a) would grant jurisdiction to the United States district courts over any civil action or claim arising under the Act, expressly including any claim for money damages arising under a self-determination contract. In other words, despite applying the Contract Disputes Act to self-determination contracts for all other purposes, tribal contractors are to be exempted from the requirements of that Act when it comes to seeking judicial review of contracting officers' decisions and decisions of agency boards of contract appeals.[8]

Instead of a trial *de novo* in the United States Claims Court, or before an agency board of contract appeals (41 U.S.C. §§ 606 & 609(a)) -- both of which possess vast expertise in the law applicable to government contract claims[9]

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8. This logically follows from proposed section 110(a), and is made explicit in proposed section 110 (d) (2) as contained in section 206 of the Committee amendment to S. 1703.

9. For example, members of agency boards of contract appeals must have a minimum of five years experience in public contract law. 41 U.S.C. § 607(b)(1) (1982).

-- a tribal contractor would be allowed to challenge an adverse contracting officer's decision in a United States district court that likely has little or no experience with government contracts or the Contract Disputes Act. The various -- and constantly changing -- U.S. Attorneys' offices will face a similar problem in trying to defend against claims they otherwise have no occasion to litigate.

Moreover, instead of an appeal *on the record* to the United States Court of Appeals for the Federal Circuit (41 U.S.C. § 607(g)(1)), a tribal contractor will be allowed to challenge an adverse determination by an agency board of contract appeals in the Claims Court or a United States district court. We are aware of no justification for this unprecedented departure from the "fair, balanced, and comprehensive statutory system of legal and administrative remedies" established by the Congress in the Contract Disputes Act to resolve contract-related claims against the government. *See* S. Rep. No. 1118, 95th Cong., 2d Sess. 1 (Aug. 15, 1978). Singling out tribal contractors in this way raises significant litigative problems. It also is likely to generate pressure from other classes of government contractors seeking the same opportunity.

The report accompanying the Committee amendment to S. 1703 provides no persuasive rationale for creating a specialized scheme of judicial review for disputes involving self-determination contracts. The report notes that:

> The amendments made by section 110 are necessary to give self-determination contractors viable remedies for compelling BIA and IHS

> compliance with the Self-Determination Act. The strong remedies provided in these amendments are required because of those agencies' consistent failures over the past decade to administer self-determination contracts in conformity with the law. . . . Existing law affords such contractors no effective remedy for redressing such violations.

S. Rep. No. 274, 100th Cong., lst Sess. 37 (Dec. 22, 1987). We strenuously dispute the allegations contained in the above passage. But even if true, these assertions simply justify application of the Contract Disputes Act -- in toto -- to self-determination contracts. They provide no basis for applying that Act in part, but then establishing a completely new method of judicial review.

The report speaks at length about a perceived inability on the part of tribal contractors to obtain necessary redress under current law. Although we do not completely accept those contentions, they are irrelevant in determining whether the tribes should be provided judicial remedies other than those contained in the Contract Disputes Act. In the past, any problem in obtaining judicial review of a self-determination contract dispute principally could be attributed to the fact that the Contract Disputes Act did *not* apply to such contracts.[10] But S. 1703 changes that simple fact.

Now that the Contract Disputes Act is to apply to self-determination contracts, there is no persuasive reason for

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10. *Busby School of the Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596 (1985); *Papago Indian Tribe of Arizona*, IBCA-1962 and IBCA 1966, (1986), 22 I.D. 191, 86-2 BCA 18,859.

allowing the Indian tribes to deviate from the time-tested method of seeking judicial review specifically provided for in that Act. No doubt other government contractors also would prefer to litigate their contract claims in the district courts. But the United States Claims Court is highly specialized and experienced in resolving both contract disputes and Indian claims. It is a court of nationwide venue, access to which has been made convenient for litigants across the country. There is no plausible reason for granting tribal contractors the right to avoid that forum at their whim.

In addition to the lack of any reasonable basis for exempting tribal contractors from the provisions concerning judicial review contained in the Contract Disputes Act, the alternative provisions contained in proposed section 110(d)(2) would increase transaction costs, as well as raise significant questions of law. For example, tribal contractors would have an additional level of review available in challenging a contracting officer's decision. Under the Contract Disputes Act, a contractor has one chance at *de novo* review (before an agency board of contract appeals *or* in the United States Claims Court), one appeal as a matter of right from that review (to the Federal Circuit, regardless of the trial forum), and subsequent discretionary review in the United States Supreme Court (28 U.S.C. § 1254). Under proposed section 110(d)(2), an additional level of review is injected for no apparent reason.[11]

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11. Under proposed section 110(d)(2), a tribal contractor might first challenge an adverse contracting officers decision before an agency board of contract appeals. If the contractor is dissatisfied with the board's decision, that decision can then be challenged, as a

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Appendix

We vigorously contest any notion that an additional layer of review of self-determination contract claims is necessary or desirable. Not only will this delay the resolution of self-determination contract claims, but it is equally sure to increase the transaction costs associated with pursuing and defending such claims.

The judicial review provisions in proposed section 110(d)(2) also are likely to produce a real deal of uncertainty in the law. Under the Contract Disputes Act, the United States Court of Appeals for the Federal Circuit is principally responsible for and capable of developing a stable body of law applicable to resolving public contract disputes. That may well change for the worse if proposed section 110(d)(2) is enacted. Because that proposed section would allow self-determination contract claims to be litigated in the various district courts, those courts routinely would be asked to rule upon questions of public contract law.

The question then becomes whether those courts should consider themselves bound by Federal Circuit precedent. The Committee amendment does not answer that question. Nor is the answer obvious under existing law. Credible arguments can be made for appellate jurisdiction over district

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matter of right, in either the Claims Court or a United States district court (for still another *de novo* review?). And, of course, the decision of either the Claims Court or the district court will also be appealable as a matter of right to a Circuit Court of Appeals, with discretionary review in the United States Supreme Court. This scenario could result in four separate decisions upon the merits of a self-determination contract claim before it is finally resolved.

court decisions involving self-determination contracts in both the Federal Circuit and the regional circuits. *Compare* 28 U.S.C. §§ 1294 and 1295(a)(10).

The potential for confusion may well be exacerbated by section 204 of the Committee amendment, which would exempt self-determination contracts from the coverage of federal procurement law and federal acquisition regulations. To the extent there is a recognizable body of public contract law, it largely has evolved as the courts or agency boards of contract appeals have interpreted and applied federal procurement law and the federal acquisition regulations.[12] Regardless that self-determination contracts may not otherwise be considered "procurement contracts," unless this body of existing law can be looked to for guidance, the courts and boards will have no foundation upon which to resolve disputes.

This legislation would create a most disturbing anomaly. Self-determination contracts would be subject to some -- but not all -- of the procedural aspects of the Contract Disputes Act. At the same time those contracts would not be subject to the substantive law interpreting and applying that Act. And many of the courts being asked to deal with this confusion will have had no prior experience with public contract law.

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12. The Contract Disputes Act, by its terms and from the legislative history, was carefully crafted to apply principally to "procurement contracts." *See* 41 U.S.C. 602(a) (1982) (With the exception of contracts for the sale of personal property, the Contract Disputes Act applies solely to contracts to procure goods or services.). As a result, the substantive law involving the Contract Disputes Act essentially is procurement contract law.

In short, what heretofore has been a relatively stable body of law will become yet another legal quagmire. And, of course, when the law is unsettled, the incentive for litigation increases. No one benefits from such a result -- not the government, not government contractors, and certainly not the Indian tribes.

Applying the Contract Disputes Act to self-determination contracts raises many serious concerns.[13] The adequacy of the Acts framework for judicial review, however, is not one of them. As a result, S. 1703 should allow tribal contractors the very same opportunity for, and standard of, judicial review that is available to every other government contractor, but no more.

For strong public policy reasons, we also must continue to object to proposed section 110(e), which makes both the Contract Disputes Act and the Equal Access to Justice Act (EAJA) applicable retroactively to tribal contractors whose self-determination contract disputes were resolved between March 17, 1986, and the enactment of S. 1703. Retroactive application of laws like the EAJA to controversies which

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13. For example, because funding for self-determination contracts is appropriated and managed in markedly different fashion from other agency appropriations, with the agency having much less flexibility to shift self-determination funds, applying the Contract Disputes Act -- and its provisions concerning access to and reimbursement of the Judgment Fund for successful claims -- to self-determination contracts may well lead to a significant loss of agency and congressional control over appropriations for the self-determination program.

already have been resolved often generates more inequity -- not to mention problems and expense -- than it rectifies.[14]

For the reasons stated above, and those contained in my letter of October 27, 1987, we remain opposed to S. 1703, as amended. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

s/ John R. Bolton
John R. Bolton
Assistant Attorney General

cc: Honorable Daniel K. Evans
Honorable Joseph R. Biden
Honorable Strom Thurmond

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14. The Committee report suggests that this retroactivity is premised upon the same rationale which supported the retroactive application of the 1985 amendments to the EAJA. S. Rep. No. 274, at 37. But this rationale is incorrect. At the time the 1985 amendments to the EAJA were enacted, the EAJA had lapsed because earlier reauthorization legislation had been vetoed. The President's veto did not reflect any lack of support for the EAJA, but only his dissatisfaction with certain provisions of what was to be a permanent reauthorization. It was clear to all concerned that the EAJA ultimately would be reauthorized, and that it would be extended to cover those cases otherwise not covered because of the intervening lapse. As a result, all parties to those cases were, or should have been, aware that an application for fees and expenses under the EAJA ultimately might be appropriate. Unlike the disputes which likely would be revived by proposed section 110(e), in those cases there was ample incentive and notice to preserve the evidence and arguments which would likely bear upon the merits of any such application.